

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

74-1693
74-1693
74-1704

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1693
74-1704

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

TILNEY & COMPANY and FREDERICK TILNEY,

Defendants-Appellants.

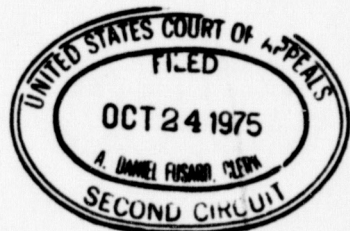
On Appeal from the United States District Court for
the Southern District of New York

ANSWERING BRIEF FOR CROSS-APPELLANT AND APPELLEE
I. ALAN HARRIS, Former Receiver

SHAW BERNSTEIN SCHEUER BOYDEN & SARNOFF
Attorneys for Cross-Appellant and Appellee
I. Alan Harris, Former Receiver
292 Madison Avenue
New York, New York 10017
Tel: (212) 689-5931

Of Counsel:

WILLIAM BERNSTEIN
MICHAEL G. WOLFSON



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1693
74-1704

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
-against-
TILNEY & COMPANY and FREDERICK TILNEY,
Defendants-Appellants.

On Appeal from the United States District Court for
the Southern District of New York

ANSWERING BRIEF FOR CROSS-APPELLANT AND APPELLEE
I. ALAN HARRIS, Former Receiver

The Waddington Bank

Only page 15 of the reply brief of defendants-appellants Tilney & Company and Frederick Tilney (jointly, "Tilney") purports to answer the brief for cross-appellant and appellee, I. Alan Harris, former receiver ("Harris").

Tilney's reply brief creates the misleading impression that Harris stated at the public auction of the Waddington shares on September 24, 1969 that the bank was in poor condition. The purpose of this distortion of the record below is to suggest that Mr. Pack, who was the sole bidder and purchaser at the auction, would have paid more than \$50 per share for the Waddington shares had Harris not made that statement. The fact is that Harris was not present at the auction and made no such statement (App. 308).

While Harris did make statements concerning the poor condition of the bank at the hearing on June 26, 1969 (App. 218-219), Mr. Pack was neither present at that hearing (App. 215) nor does he state in his affidavit, sworn to April 10, 1971, long after the events in question, that he was aware of Harris's statements prior to Pack's purchase of the Waddington shares on September 24, 1969 (App. 1011-1013). Moreover, Mr. Pack nowhere states or implies that the Waddington shares had a value of more than \$50 per share, the amount of his bid and purchase. On April 10, 1971, the date he swore to his affidavit, Mr. Pack also admits that, in evaluating Mr. Harris's statements of June 26, 1969, he, Pack, was engaging in hindsight or, as Pack puts it, "looking back" (App. 1012-1013).

Finally, the validity of Mr. Pack's opinion as to the condition of the bank is at least questionable in view of the contrary opinion, based upon the relevant facts available to it, held by the New York State Banking Department. Those facts showed the bank to be in an unsatisfactory condition, a condition of grave concern to the Banking Department (App. 1039-JJ, 1039-KK).

Tilney has also introduced much confusion by his specious claim that the 787 Waddington shares owned by the estate, together with the 96 Waddington shares owned by Mrs. Tilney, had a value of more than \$50 per share since they necessarily represented "control" of the bank. If that was the case, why did Mr. Pack, who bought the 787 Waddington shares at the public auction in September 1969, not become a director and chairman of the board of the bank until February 1970, almost five months later? (App. 1011). The fact is that these shares did not represent control and, as Tilney knows, Mr. Pack purchased approximately 1,000 additional Waddington shares in early 1970 before he was able to sit on the board of the bank and to become its chairman. Thus, Harris's opposing view in June 1969 that the shares held by the estate and by Mrs. Tilney did not represent control proved correct (App. 191).

Although Tilney was given every opportunity to obtain an appraisal of the Waddington shares held by the estate in order to support his opinion that they had a value of more than \$50 per share, he failed to obtain an appraisal. A fair inference to be drawn from such failure is that Tilney could not find an appraiser who would so value these shares. Tilney's criticism of the Court below in this connection is accordingly unfair. It is abundantly clear that the receivers and the Court made every effort to get the highest possible price for the shares. The Court's order for the public auction of the Waddington shares provided for extensive advertising. Tilney himself prepared and widely distributed a brochure containing a notification and the material facts concerning the Waddington shares and their public auction (App. 308-316). Yet, that public auction realized the same price of \$50 per share that Studley had paid the estate in mid-1968. As to Studley's purchase at \$50 per share, the following exchange during the hearing of June 5, 1969 in the Court below is significant (App. 192):

"THE COURT: Did you ever indicate any disapproval of the \$50 price for this stock?

MR. TILNEY: I did not, sir."

Respectfully submitted,

SHAW BERNSTEIN SCHEUER BOYDEN
& SARNOFF
Attorneys for Cross-Appellant
and Appellee, I. ALAN HARRIS,
former receiver
292 Madison Avenue
New York, New York 10017
(212) 689-5931

William Bernstein
Michael G. Wolfson
Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.:

ELIZABETH HEIN ABRAMS, being duly sworn,
deposes and says: deponent is not a party to the
action, is over 18 years of age and resides at
65-61 Saunders Street, Forest Hills, New York 11374.

On the 21st day of October, 1975, deponent
served ^{two copies of} the within Answering Brief For Cross-Appellant
And Appellee I. Alan Harris, Former Receiver, upon
the following attorneys, at the addresses designated
by them for that purpose:

SAXE, BACON, BOLAN & MANLEY, P.C.
Attorneys for Defendants-Appellants,
Tilney & Company and Frederick Tilney
39 East 68th Street
New York, N. Y. 10021

WAGNER, QUILLINAN & TENNANT
Attorneys for Receiver-Appellee,
Joseph C. Hogan
350 Fifth Avenue
New York, N. Y. 10001

SECURITIES AND EXCHANGE COMMISSION
Plaintiff-Appellee
26 Federal Plaza
New York, N. Y. 10007
Attention: Franklin D. Ormsten, Esq.

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

100-100000-100000

by depositing true copies of same enclosed in
postpaid properly addressed wrappers, in an official
depository under the exclusive care and custody of
the United States Postal Service within the State of
New York.

Elizabeth Hein Abrams

Elizabeth Hein Abrams

Sworn to before me this
21st day of October, 1975

Diane W. Bishop

DIANE W. BISHOP
Notary Public, State of New York
No. 31-0300450
Qualified in New York County
Commission Expires March 30, 1977